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II. THE TRANSFER OF PROPERTY ACT AMENDING BILL—(*Continued*).

MORTGAGES.

The chapter on Mortgages in the Transfer of Property Act of 1882 has not been so exhaustive as a Code ought to be and the law of mortgages as administered by the courts has had to deal with several points on which the Act has been silent. Besides there have been several conflicting decisions on the various sections of the Act. The draft bill claims to have made some far-reaching changes in the law and to provide for several cases not expressly dealt with in the previous Act. We shall now examine the proposed changes clause by clause.

Clause (19) of the bill deals with the definition of the various kinds of mortgages. The class of mortgages known as "mortgages by conditional sale" has been a source of trouble to the courts, as it is oftentimes very difficult to decide whether a transaction is really an out-and-out sale with a clause for repurchase or a mortgage by conditional sale. The new proposal provides that no transaction can be a mortgage by conditional sale unless the whole arrangement embodying the ostensible sale and the usual conditions is embodied in one single document. This is really insufficient to meet the difficulties experienced. Still the governing test will be the intention of the parties. The new statutory proviso is only of a negative character and it does not say that wherever there is only one document evidencing the sale and the condition, the transaction is only a mortgage by conditional sale irrespective of the intention of the parties. The words "and in such a case the transaction shall be deemed to be a mortgage by conditional sale" should be added to the new proviso to really effectuate the change which is contemplated. We would also observe in this connection that the existing period of limitation for redemption of mortgage by

conditional sale is too long and should be reduced to twelve years.

Clause 19 (*c*) proposes to alter the definition of the term "usufructuary mortgage" with a view to get over what is stated to be the anomalous decision of the Madras Full Bench in *Subbamma* v. *Narayya*[1]. The said decision permits a usufructuary mortgagee who has not been given possession of the mortgaged properties to sue for sale and realisation of the money advanced under S. 67 of the Transfer of Property Act. The proposed alteration is, to confine the remedy in such a case to a suit for possession by way of specific performance. We do not see why it should be regarded as unreasonable to permit a suit for sale in such cases. The same remedy may usually be secured by taking care to draft the instrument of mortgage as a combination of simple and usufructuary mortgages. In the circumstances we do not think that the proposed change is called for. The other minor alteration in the definition is unobjectionable and may be accepted.

Clause (19) (*d*) proposes a new definition of the term "anomalous mortgage". While the inclusion of the definition in S. 58 is a logical arrangement there is no reason why the existing class of anomalous mortgages should be enlarged by omitting the combinations of a simple mortgage and an usufructuary mortgage, and a mortgage by conditional sale and an usufructuary mortgage from the exceptions. The new definition unduly enlarges the scope of free contractual terms in respect of such combined mortgage instruments, as they will come under the class of anomalous mortgages wherein the rights and liabilities of the parties will be governed by the *ex facie* terms under S. 98.

Clause (20) is intended to provide that all mortgages, whatever may be the amount of the principal money secured, should be only by registered instrument. This amendment may be well accepted as the policy of compulsory registration of all sales and mortgages is a sound one. But we would suggest that advantage should be taken of the present bill to dispense with the necessity of attestation in the case of mortgage instruments. Apart from the difficulties in connection with the meaning of the term 'attestation' which has necessitated a number of amending bills in recent times, we do not see any reason why

1. (1917) I.L.R. 41 M. 259: 33 M.L.J. 623 (F.B.).

mortgage transactions should be dealt with on a different principle from sales, exchanges and leases.

Clause (22) proposes to amend S. 60 of the Transfer of Property Act by substituting the word 'due' for the word 'payable' in order to make it clear that the right of redemption and foreclosure shall ordinarily be co-extensive. By virtue of a special agreement the mortgagor may have the right to redeem even prior to the due date. This is in accordance with recent pronouncements of the Privy Council and this may be accepted. The other alterations proposed are also unobjectionable.

Clause (23) deals with the doctrine of consolidation of mortgages. The Indian law has already abolished the doctrine to a large extent and the proposed redrafting of S. 61 of the Act carries out the principle further by not allowing consolidation even when the same property or portion of it is mortgaged more than once. This may be accepted especially as the section applies only where there is no contract to the contrary. The words "when the principal money of any two or more of the mortgages has become due" seem, however, to be superfluous.

The amendment proposed in clause (24) is really consequential on the changes proposed in the definition of a usufructuary mortgage.

Clause (25) provides for an obvious omission in the old S. 63 where the rate of interest is not provided for.

Clause (26) introduces a new section 63-A to deal with the respective rights of mortgagor and mortgagee in the case where improvements have been made by the mortgagee. We agree that ordinarily the mortgagor shall be entitled to the improvements on redemption and that he should be made to pay the costs thereof only in the cases provided for by the sub-clause (2) of the proposed section. To this list must also be added the case where the mortgagor expressly or impliedly consents to the proposed improvements being made by the mortgagee. The words "or with the consent express or implied of the mortgagor" should be added after the words "public authority". Again in the enumerated cases there is no reason why the mortgagor should have freedom to contract himself out of the liability to pay the proper cost of the improvements. It will be manifestly unjust to compel the mortgagee to carry out an improvement in compliance with the lawful order of any public servant or public authority and yet allow the mortgagor to escape the obligation to pay for the expense by a contract to that effect. We do not

agree that the right of private contract should be completely preserved. We would suggest that in clause (1) the words "in the absence of a contract to the contrary" and the words "and the mortgagor shall not save only in cases provided for in sub-section (2) be liable to pay the cost thereof" should be omitted, and in clause (2) the words "in the absence of a contract to the contrary" should also be omitted. As the Indian law even on the lines of the proposed amendment will be less generous to mortgagees than recent English decisions we prefer to regulate the rights of the parties in the manner indicated above and to take away the right of parties to reduce the liability by a contract to the contrary.

The proposal to omit the expression "for a term of years" in sections 64, 65 and 71 is obviously a proper one as there is no reason why the principle of the sections should not govern all kinds of leases.

Similarly also clause (28) (*b*) rightly proposes to omit the exemption of a usufructuary mortgage from the scope of clauses (*c*) and (*d*) of section 65 of the Act.

Clause (29) proposes to introduce a new section 65-A permitting the mortgagor while in possession of the mortgaged property to grant a lease which will be binding on the mortgagee. As this is a new power in derogation of the mortgagee's rights a number of restrictions is placed as regards the terms of the lease which is permissible. In this presidency agricultural lands which form the large class of mortgaged property are usually enjoyed by the owners by granting leases. It is, therefore, desirable to recognise a right in the mortgagor who is left in possession of the mortgaged properties, to grant a lease in the usual course of management and in conformity with local usages. The restrictions proposed are generally acceptable, but we think that the proposed sub-clause (*e*) of the second sub-section is likely to create difficulties. As often as not, agricultural lands are let on lease for periods of more than one year, so as to allow some improvements to be made by the cultivating tenant and also in many cases the same is necessary with reference to the nature of the crops. In the case of garden lands and punja cultivation, lease from year to year is oftentimes impracticable and uneconomical. There must, therefore, be greater liberty as to the terms of the lease in such cases and the proposed sub-clause (*e*) is thus likely to defeat the object in view. The language in clause (1) of sub-clause (2) is sufficiently general to safeguard

the rights of the mortgagee. If, however, it is thought desirable to give greater precision, we would suggest that the word "ordinarily" should be inserted in clause (e) and some discretion should be left to courts of law with respect to the matter. The liberty reserved by sub-section (3) to provide for different arrangements by necessary provisions in the mortgage deed will not be ordinarily effectual as the form of conveyancing in vogue is not likely to be substantially altered. Besides the tenants who take leases may not always be even aware of the facts that the lands have been mortgaged by the landlord.

Clause (30) amends S. 67 of the Act by narrowing down the right of foreclosure in certain kinds of mortgages. We think that a suit for sale should be the only remedy of a mortgagee and that the right to foreclose should be taken away. The proposed amendment, however, does not go to that full length and still allows a foreclosure decree in the case of "mortgage by conditional sale" and in anomalous mortgages where the deed allows the same. It is a proper proposal to take away the right of foreclosure in the case of equitable mortgages by deposit of title-deeds and in the case of English mortgages. This reservation of the right of foreclosure in case of anomalous mortgages also furnishes another reason why the definition of that term in S. 58 should be narrowed down as we have suggested above.

Clause (31) proposes a new section 67-A to compel a mortgagee who holds more than one mortgage executed by the same mortgagor to bring a suit on all his mortgages in certain cases. This is to prevent a sale of mortgaged properties in execution of a decree for sale in respect of one mortgage reserving the rights of the same person as mortgagee under other mortgages in his favour, whether prior or subsequent. We do not think that the proposed section is exhaustive or sufficient to provide for the very many complicated cases that may arise. In the first place the section, as it is now drafted, applies to a case where the same mortgagor has executed more than one mortgage in favour of the same mortgagee though over different properties. There is no reason why when the properties are different, the mortgagee should be compelled to institute one suit on all his mortgages. This course will manifestly lead to various anomalies and unnecessary complications and will, in very many cases, operate to the prejudice of the mortgagor and of other parties who may hold derivative interest in one or other of the sets of mortgaged

properties; secondly, there is no valid reason why a contract to the contrary between the mortgagor and the mortgagee should take away the disability sought to be imposed.

Clause (32) of the bill proposes to recast section 68 of the Act which deals with the right of the mortgagee to bring a suit for the mortgage money. We agree with the minor alterations proposed in the various classes I to IV, which are practically identical with the terms of the old section. Sub-clause (2) is a new provision to compel the mortgagee to exhaust all his available remedies against the mortgaged property before obtaining a decree for money except in cases where he elects to abandon the entire security and extinguishes the mortgage by a registered instrument. This provision which operates to stay all suits and proceedings to obtain a money decree in clauses 1 and 2 of the new section 68 may be accepted with this qualification that the stay of proceedings should be only so far as the relief against the mortgagor is concerned. There is no reason why a decree should not be obtained and allowed to be executed against other persons such as other joint promisors who may have bound themselves personally to pay the debt. In view of O. II, R. 2 of Civil Procedure Code, a single suit may be filed against both and there is no necessity to stay the entire suit.

Clause (33) of the bill deals with the mortgagee's power of private sale without intervention of court. The amendment now proposed to allow the same powers of private sale in the case of English mortgages, whether the mortgage deed confers a power or not, is a proper one and the Trustees and Mortgagee Powers Act, 1860, need no longer be made applicable to English mortgages. The consequential changes proposed may be accepted. We should, however, think that a power of private sale may be conferred statutorily without reference to agreement of parties to be provided for in the mortgage deed in the following two cases (1) where the mortgagee is the Secretary of State for India in Council holding a first mortgage, and (2) where the mortgaged property or part thereof is situated on the date of mortgage within the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, in so far as the properties in such towns are concerned and where the mortgagee holds a first mortgage over such properties. The case of private sales by second and later mortgagees of the mortgaged properties is likely to lead to such complications as regards the rights of the prior mortgagee and various purchasers that we think it better not to allow such rights in those cases. We think with

the safeguards mentioned above the first mortgagees of properties in the selected towns can be given the statutory power of private sale as far as the town properties are concerned. The conferring of such statutory power and the omission of the present rule which requires such power to be expressly conferred by the mortgage deed will incidentally remove the existing anomaly of insisting on the power being conferred at the time of the first execution of the mortgage deed. There is no valid reason why a subsequent agreement conferring such a power should not be recognised. Secondly, in the case of equitable mortgages created by mere deposit of title-deeds of properties in the towns mentioned above, the existing provision will deny the right of private sale where there is no registered instrument of mortgage created. There is no justification for making a distinction between the two classes of cases, whether there is a deed creating the mortgage or whether there is a mere deposit of title-deeds without a registered instrument. In view of the extended powers we have suggested, we will omit all references to the Governor-General's power to enlarge the selected list of towns or area by notification.

Clause (34) proposes to introduce a new section allowing for the appointment of a receiver in cases where the right to exercise the power of private sale has arisen. We think such a power is unnecessary and likely to be oppressive under the conditions prevailing in the country. The analogy of the English law in this particular is not a safe one to be followed. Nor has any necessity been felt or expressed for such powers. We would suggest that the entire clause should be omitted.

Clause (36) proposes to allow to all mortgagees the rights now conferred on mortgagees in possession of mortgaged property in the cases referred to in sub-clauses (*b*), (*c*) and (*d*) of S. 72. This should be accepted as there is no reason why such rights should not be given to all mortgagees. The proposed amendment, sub-clause (*iv*) is unnecessary and should be omitted. In the proviso to be added, the words "after notice in writing to the mortgagor by the mortgagee" may advantageously be added after the words "has failed".

Clause (37) of the bill recasts the language of S. 73 of the Act. The inclusion of the words "other changes of a public nature" may be accepted, but the substitution of the words "shall be entitled to claim payment" out of any surplus for the words "has a charge on the surplus if any" is likely to affect

the period of limitation for enforcing the claim. This aspect of the matter does not seem to have been borne in mind. The addition of a new clause dealing with the case of compulsory acquisition of mortgaged property may be accepted with similar reservation as to the language used so as not to reduce the period of limitation. The option to the mortgagee to enforce the claim irrespective of the due date is also a change that is unobjectionable.

Clause (38) proposes to omit S. 74 and S. 75 of the Act in view of the new sections proposed to be introduced dealing with the right of subrogation.

Clause (39) proposes some minor alteration in S. 76 of the Act dealing with the rights and liabilities of a mortgagee who takes possession of the mortgaged property during the continuance of the mortgage. We agree that the alterations proposed are sound in principle.

Clause (40) proposes to repeal S. 80 of the Act which abolishes "tacking," but clause (46) introduces the identical section as section 93. This course is unnecessary and S. 80 of the Act can very properly retain its present position having regard to the matters dealt with by Ss. 78 and 79 of the Act.

Clause (41) proposes to widen the rule as to the right of marshalling by making the right available whether there is notice or not of the prior mortgage and enabling all subsequent mortgagees to claim the right and by making the section apply to cases where there are more than two properties mortgaged. All these amendments are based on sound principles and may be accepted.

Clause (42) proposes to widen the rule as to contribution by making it applicable to cases where the mortgaged property is subsequently divided into distinct and separate portions. the liability of the co-sharers being distinct and several. It is also proposed to make the value of the properties as on the date of the mortgage the basis of the calculation as to the rate of contribution. These amendments are proper and unobjectionable.

The alterations proposed by clause (43) of the bill in S. 84 dealing with the summary procedure for redemption by a mortgagor by deposit of the mortgage money into Court to the account of the mortgagee may also be accepted as they tend to remove any doubts as to the legality of the present practice. The provision for restoration of possession by the mortgagee who is in

possession of the mortgaged property is also a useful and desirable one.

Clause (44) proposes to make some alterations in the language of section 84 to make it clearer. The main amendment that is proposed is to provide for the continuance of interest where the mortgagor withdraws the whole or part of the mortgage money which he has deposited in Court without a previous tender. We agree that this is a reasonable provision and the new proviso may be accepted.

Clause (45) proposes to omit sub-clauses (*g*), (*e*) and (*f*) of S. 91 of the Act. The omission of "an attaching creditor" from the scope of S. 91 will make it unnecessary to implead him as a party to a mortgage suit, a question on which there has been some difference of opinion.

Clause (46) provides for a new section dealing with the right of subrogation. The main rules of the law of subrogation are recognised in the section. The provision for registered instrument evidencing an agreement in writing in the case of a creditor who lends money to a mortgagor from out of which a prior mortgage is redeemed is a desirable one and will avoid doubtful questions of intention in such cases. The section cannot be regarded as providing for all cases, but this is not possible or desirable.

Clause (46) also provides for the rights of mesne mortgagees. As O. 34, R. 11, Civil Procedure Code, is proposed to be omitted along with S. 74 and S. 75 of the Act, the new Ss. 92 and 94 as drafted by the said clause deal completely with the matters governed by the repealed sections and rules. This clause may be accepted as it stands.

Clause (47) deals with the right of a co-mortgagor who redeems the entire mortgage. Under the proposed new S. 92, he will have a right of subrogation and this clause allows him to add the proportionate costs to the share of the mortgage money due to him in enforcing his right. The reference in the old section to the necessity of "obtaining possession" is rightly done away with as the rule should obviously be applicable to all mortgages, whether usufructuary or otherwise.

Clause (49) proposes to alter the language of S. 100 of the Act to make it clear that the charge-holder has the same rights as far as the case may be as a simple mortgagee. It also expressly provides that a charge as such cannot be enforced

against the property in the hands of the transferee for consideration without notice. These amendments are quite proper.

Clause (50) proposes to entirely recast the language of S. 101 of the Act. The existing section makes the question of merger or no merger dependent upon the intention of the parties and in general the presumption is in favour of keeping the mortgage alive. The proposed alteration is on the lines of declaring statutorily that there is no merger of interests as against the subsequent encumbrancers irrespective of any question of proving an intention to keep alive the prior mortgage. We think this may be accepted.

Clauses (51) and (52) propose some minor alterations which are unobjectionable.

S. P.

SUMMARY OF ENGLISH CASES.

DUCKER *v.* REES ROTURBO DEVELOPMENT SYNDICATE, (1928) A.C. 132 : 97 L.J. (H.L.) K.B. 317.

Income-tax—Sale of patent rights—Sale proceeds if represent profits or capital asset—Liability to assessment—Income-tax Act, 1918, *Sch. D.*

The respondent company was formed for the special purpose of acquiring rights in regard to a particular invention that had relation to centrifugal turbine pumps. By an article of the Memorandum of Association, the company was authorised to sell and grant rights and privileges in respect of all or any part of the property and rights of the company. The special purpose of the company was carried out by acquiring two-thirds of patent rights and reserving one-third to the inventor. Subsequently the company acquired further English and foreign patents in connection with the invention. The respondent company and the inventor granted to an American company a license to manufacture under a United States patent with an ultimate right of acquiring the whole patent by purchase. Subsequently the United States patent was sold and the sum representing the sale proceeds was assessed to tax by the Special Commissioners on the ground that the sum was a gain made in an operation of business in carrying out a scheme for profit-making and not capital asset.

Held, that the Special Commissioners had adopted the right test in assessing that sum and that there was abundant evidence upon which their conclusion of fact could be supported.

HONGKONG AND SHANGHAI BANKING CORPORATION *v.* LO LEE SHI, (1928) A.C. 181: 97 L.J. (P.C.) 35.

Bank-note—Accidental mutilation—Fragments recovered and not identified—Absence of the number of note—Liability of the Bank—Bills of Exchange Act, 1882, *S.* 64.

The appellant Bank issued a bank-note for £500 payable to bearer on demand. The respondent obtained this note from her husband. She placed it in the pocket of some garment and having forgotten she had placed it there, she washed, dried and starched the garment and was proceeding to iron it when she felt the remains of the note. From the fragments of the note a considerable portion of the note was replaced and its most critical characteristics were made plain. But the number of the note could not be recovered. When the respondent presented the note to the Bank for payment, the Bank refused payment.

Held, that the identity of the note as a Bank-note was sufficiently established as it contained all the necessary elements that would render it valid and effectual as a negotiable instrument. As the number of the note was not included in the operative part of the note, the contract had never been altered, and the Bank would be liable on the note.

Held, also, that the Bills of Exchange Act, 1882, S. 64 did not apply to an alteration accidentally made in a bill.

REX *v.* O'DONOGHUE, 97 L.J.K.B. 303.

Criminal Law—Murder of a child one month old by the mother—'Newly born'—Meaning of—Infanticide Act, 1922.

The accused gave birth to an illegitimate child. After the child had lived over a calendar month, the accused murdered it and made a confession to the Court.

Held, that the accused could not be found guilty of infanticide as a child one month old was not 'newly born' within the meaning of the Infanticide Act, 1922.

In re REEVES : REEVES *v.* PAWSON, (1928) 1 Ch. 351.

Will—Construction—Bequest of "my present lease"—Subsequent renewal of the lease by the testator—Codicil confirming the will in all respects—Wills Act (1837), *S.* 24.

During the currency of a lease, the lessee bequeathed to his daughter "all my interest in my present lease of No. 1 Chesterfield Street". The testator subsequently obtained a renewal of the above lease and at a later date having added a codicil to his will, confirmed his will in all other respects.

Held, that the benefit of the renewed lease passed to the testator's daughter under the provisions of the will. The use of the words in the codicil "in all other respects I confirm my said will" would have the effect of bringing down the date of the will to the date of the codicil and making the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date.

M. *v.* M., (1928) P. 123.

Judicial separation—Alimony pendente lite—*Wife when entitled after the decree.*

A wife who has obtained a decree of judicial separation is not entitled to an allotment of alimony *pendente lite* unless she has obtained an order for it before the decree, although she may have commenced proceedings earlier in the suit to obtain it.

GOSSE MILLARD *v.* CANADIAN MERCHANT MARINE, (1928) 1 K.B. 717: 97 L.J. (K.B.) 193 (C.A.).

Shipping—Bill of lading—Cargo damaged during transit —Negligence of the shipowners' servants in leaving the hatches open—Damage by rain—"Act or neglect or default in the management of the ship"—Shipowners not liable—Carriage of Goods by Sea Act, 1924, *Art. IV, R.* 2.

A cargo of tinplates was shipped on board the "Canadian Highlander" by the plaintiffs under a bill of lading.. During the voyage the steamship got into repairs and so was being kept in a dock for repairs. While the repairs were being executed the workmen left open the hatches of the hold in which the tinplates were stored. Consequently rain water penetrated the hold and damaged the tinplates. In an action by the owners of the tinplates in respect of the damage so caused,

Held, that the shipowners were not liable for the damage, as the negligence of the management of hatches was "negligence in the management of ship" within the meaning of Art. IV, R. 2 of the Carriage of Goods by Sea Act, 1924.

In the goods of GATES, (1928) P. 128: 97 L.J. (P.) 76.

Will—Construction—Bequest of "all my money to X"—Estate not wholly disposed of—Right of persons entitled under an intestacy to grant of administration—Probate non-contentious rules, R. 119.

Where a testator died leaving a will by which he bequeathed "all his money to X" and the testator's estate comprised of cash in the house and at the Bank, a mortgage debt, stocks and shares, furniture and an equity of redemption of freehold property,

Held, that the will disposed of all the testator's estate except the equity of redemption of freehold property and the furniture.

Held further, that as the estate was not wholly disposed of by the will, persons entitled under an intestacy could take a grant of administration in priority to legatees or devisees.

PECHERIES OSTENDAISES *v.* MERCHANTS' MARINE INSURANCE CO., (1928) 1 K.B. 750.

Costs—Taxation—Costs incurred before the action and during stay of proceedings—Powers of the Taxing Master to grant.

Per Lord Hanworth, M.R.—"There is power in the Taxing Master to allow costs incurred before action brought, and if the costs are in respect of materials ultimately proving of use and service in the action, the Master has a discretion to allow these costs, which he will probably exercise in favour of the party incurring them, because they have been made use of during the course of the action."

Per Atkin, L.J.—"It is always a question of fact for the Taxing Master whether the costs were or were not reasonably incurred during that period (stay of proceedings), always bearing in mind that there was a stay and also the purpose for which the stay was granted."

In an action on a marine policy the usual order was made for the filing of affidavit of ship's papers and for a stay of proceedings in the meantime.

Held, that this stay did not paralyse the activities of either parties and prevent him preparing his case.

FOREMAN AND ELLAMS, LTD. *v.* BLACKBURN, (1928) 2 K.B. 60.

Sale of goods—C. I. F. Contract—Shipment of goods before contract—Bill of lading issued after goods shipped—Steamer halting at several places in the meantime—Buyer if can refuse to take delivery.

A contract for sale of frozen rabbits was entered into on July 2, 1926 and provided for their shipment from Sydney, C. I. F. Liverpool by a certain steamer to sail in August. The goods were shipped at Sydney in the month of June and the steamer after visiting several ports re-visited Sydney. Finally she sailed for Liverpool on August 17, 1926, when a bill of lading was issued. The buyers refused to take delivery of the goods and the suit was brought for breach of contract.

Held, that the sellers were not entitled to recover damages, inasmuch as they themselves had committed breaches of contract by shipping the goods even before the date of contract of sale and by issuing a bill of lading long after shipment of goods, the steamer having in the meantime visited ports several hundred miles from the port of shipment.

JOTTINGS AND CUTTINGS.

Grievances—Dead and Alive.—Amongst the grievances set down for remedy by the Home Office is the fact that these police magistrates are not entitled to pensions; and that is why the retired magistrate is almost as rare as the deceased animal referred to by Mr. Weller on an historic occasion. Faced with the certain prospect of a penurious retirement, they are forced to struggle on and continue while life and being last.

It is not long since the County Court Judges were in the same unhappy state. It is true that before Lord Loreburn introduced his County Courts Bill in 1908 the Lord Chancellor might, under S. 24 of the County Courts Act, 1888, recommend a County Court Judge for a pension not exceeding £1,000 a year; but his power to do so was limited to the case of a Judge being "afflicted with some permanent infirmity disabling him from the due execution of his office". Little use was accordingly made of the provision, although a great Judge of the time observed (in jest) that most County Court Judges were within its terms from the day of their appointment. Another grievance of the County Court Judge was removed at the same time.

If he were absent from any cause he had to provide and remunerate his own deputy; while his brother of the High Court, with much greater resources, was not and never had been under a corresponding obligation. Now, the deputy County Court Judge is provided at the expense of the State and receives a modest solatium of four pounds—or is it four guineas?—a day for his services.—*L. J., June* 30, 1928, p. 543.

Lord Cottenham's Sixty.—Talking of patronage, never before or since has any Lord Chancellor had a more splendid accession of that commodity than fell to Lord Cottenham on the passing of the County Courts Act, 1846. At one fell swoop he created no less than sixty Judges. Three of them were Serjeants-at-Law, and three were Queen's Counsel; the rest were Stuff-Gownsmen. William Adam Hulton, one of the appointees, continued to sit for forty years and retired in 1886. The County Court Judges, in those coarse and unrefined days, bore no particular style or title. Not until 1884 did the Order in Council appear declaring that they should be "called, known and addressed as 'his honour' prefixed to the word 'Judge,' before their respective names," and should have "rank and precedence next after knights bachelors."—*L. J.*, p. 543.

Sir Edward Clarke.—Sir Edward Clarke, the oldest King's Counsel and the Bar's "Grand Old Man," says *The Daily Telegraph,* came out of his retirement some days ago and for a few hours resumed professional duties.

In 1912, Sir Edward, who is now 87 years of age, was appointed by the Board of Trade to settle disputes under the Coal Mines Minimum Wage Act. This he did for two years, until the war automatically stopped the work. Recently a case arose in Sheffield, and the Board of Trade asked Sir Edward to appoint an arbitrator. Sir Edward declined to do so, saying that he would settle the matter himself.

Packing a suitcase, he travelled up by the night train to Sheffield and returned by the lunch train the following day, having restored peace between masters and employees during the morning.

"In spite of his age he thoroughly enjoyed the little trip," Mr. Percival Clarke, his son, said in an interview.—*L. J.*, p. 548.

Judge and Sexual Crimes.—Mr. Justice Humphreys, says *The Times,* addressing the Grand Jury at the Glamorgan Assizes at Swansea on Monday, said that the number of charges of a sexual character was a blot upon our civilisation. "One could not help thinking," he added, "that it reflects no credit upon the upbringing of those persons, and the opinion I have formed, on reading the depositions—and it is not the first time—is that the girls are just as bad as the boys. It is a very sad thing to find, in what we are pleased to think is a civilised country, that such crimes should be so common, no fewer than one-third of the cases in this calendar being made up of charges of such a character."—*L. J.,* p. 549.

The Crown Proceedings Bill.—The Lord Chief Justice at the Lord Mayor's Banquet abandoned the serious attack on "Administrative Law" which he has recently developed, for pleasantry at the expense of the growing tendency to eliminate the Judges. In the "Isles of the Blest," towards which the confusion of the Executive and Judicial powers is leading us, there is to be a single Act of Parliament of interminable length, and any difficulties are to be solved in the third floor back of a Government office. That is a pleasing after-dinner forecast, but meanwhile the serious resistance to bureaucratic justice goes on. The question of the encroachments of the Government Departments is well discussed in this month's *Fortnightly* by Sir John Marriott, M. P., in his Article on "Law and Liberty." In the main it is a statement of the rejection of Clause 4 of the Rating and Valuation Bill, and it is a protest against the system under which "many modern statutes are mere *cadres*, and afford no adequate indication of their ultimate scope." Delegated legislation has, indeed, largely undermined Parliamentary authority. And there is the letter in Thursday's *Times* from Sir Thomas Hughes, K. C., the Chairman of the Bar Council, and Sir Cecil Coward, the President of the Law Society, urging the introduction of the Crown Proceedings Bill. The letter is written in order to arouse public interest in the Bill, for, except under the pressure of public opinion, there appears to be little chance of its being taken up. Who is at fault we do not know, but it must be presumed that the Government Departments are unwilling to abandon a system of procedure under which the scales of justice are heavily weighted against the subject.—*L. J., July,* 1928, p. 2.

The Earl of Reading.—Mr. Street's "Lord Reading" (Geoffrey Bles, 10*s*. 6*d*.) reveals, so far as a contemporary biography can be expected to do so, the details of one of the most remarkable careers in legal history. Clerk, able seaman, stockbroker, barrister, Lord Chief Justice, Ambassador, Viceroy such was the sequence of posts occupied and adorned by this amazing peer. At the Bar his great gifts as a cross-examiner are still remembered and admired, and in the War troubles his financial genius was of the greatest service to this country. Mr. Street is, however, probably right in laying stress on his peculiar gift of successful compromise as perhaps the main factor in his success. His work in the United States is a fine example of his merit in this kind; but it was post-War India, which taxed his great powers to the uttermost and will prove the most enduring monument of his achievements.

A curious and interesting fact is related by Mr. Street. His progress at the Bar was in the first years so discouraging that he resolved to emigrate to the United States. His wife's persuasion alone induced him to continue; whereby he owes much, and England more, to her courage and her faith.—*L. J.*, p. 14.

Young Folks and Judges on Adultery.—Not once, but many times of late, the prevailing boy and girl artists, playwrights, critics and authors have spoken slightingly and disrespectfully of the antique moral philosophy of our Judges. They have been called old fogies; their views have been comprehensively condemned under the Victorian label; it has been said they are entirely untouched by modern thought and that they have no knowledge of the world.

It is only natural that the Judges who hear and determine divorce and matrimonial causes should come in for the brunt of this fresh young modern assault. The poor President, Hill, J., and the others may hardly utter a single word of reproach against the grossest adulterer but these critics discharge a volley of verbal missiles at their exalted heads. Giving ear to the outcry of these Enfranchised Young People, one might imagine that the Judges led a life secluded and sheltered, almost monastic; and that their absurd views on woman and marriage were discredited and cast out by the best people fully ten years ago.—*L. J.*, p. 33.

What the Judges know.—Their Lordships will probably not demur to the charge that their moral views have not broadened and loosened in conformity with the requirements of their young critics and friends; but there is not a man amongst them who will not stoutly refuse to acknowledge that he is lacking in a knowledge of the world. And, since such a knowledge is oft understood to mask an acquaintance with its more unconventional aspects, the Judge can surely claim to be a great authority, if not the greatest, in the most modern and startling manifestations of the latest life.

Every day it is his duty to insist on hearing an exact account of what actually happened and the very words that were used; words and acts of such detailed realism that no theatre could stage them and no author would dare to set them down; he has to examine not only facts, but motives and results, and to deliver judgments of great moment thereupon. Small wonder that the really up-to-date folk are resorting more and more to the Courts for the Real Thing.

Or look at the Calendar at any Assize. No publisher dare print even the bare description of some of the modern deeds therein recorded. As Dr. Johnson observed, you will find strong facts in the Calendars and the Judge has to know all about them.—*L. J.*, p. 33.

BOOK REVIEWS.

THE TRIAL OF SAMUEL HERBERT DOUGAL. Edited by F. Tennyson Jesse. Notable British Trials Series. Published by Messrs. Butterworth & Co., Ltd. Price Rs. 6-8-0.

It is almost with a sickening feeling at the inhuman acts of Samuel Herbert Dougal, that we peruse the introduction of this volume, so succinctly and yet so clearly dealing with the facts of the murder of Camille Cecile Holland. Hardly anyone, who closely follows the evidence given for the prosecution, will deem the Counsel for the prosecution, Mr. F. A. Gill, K. C., to have lacked very good materials in order to make his labours considerably easier. On the other hand, we are led to think that Mr. George Elliott gains more our appreciation, even though he has lost his case, for his really able defence which leaves nothing unsuggested in creating doubts as to the proof of the case against the prisoner. But what really strikes us in the end is, that just retribution awaited the man whose

guilt could not escape notice, despite the long time that elapsed between the murder and the investigation of the case. The pathetic end of a lady "under distressing circumstances" would be too distressing to us, but for the sentence of death passed on the murderer, which as much appeals to the reader to be the proper conclusion of it all, as to those who were actually at the trial. This volume is a good addition to the series of the British Notable Trials.—K. C.

ADVOCACY SERIES, VOLS. III AND IV. By P. Ramanatha Aiyar, B.A., B.L., Vakil, Trichinopoly and N. S. Ranganatha Aiyar, B.A., B.L. Price, Vol. III, Rs. 4, Vol. IV, Rs. 3.

The third volume of the series, bearing the title "Cross-examination as to Testified Matters", is an analytical survey of the various matters regarding which witnesses depose during a trial, just as things which they may have heard or seen or felt or smelt and so on. We have only a feeling of extreme relief throughout to find them treated so very methodically, though we are not far from realizing that, with all the fund of information under each chapter, there is hardly anything more noteworthy than an attempt to develop the subject with the help of a plethora of illustrations. The book, as it is, may satisfy the curiosity of the Advocate who has yet to begin his career as a trial lawyer, though it may not enable him to gain hints of the methods of cross-examination. Perhaps, the authors, being alive to the fact, that the excellence in that art pertains more to individual ability or genius, have refrained from dilating upon it.

The next volume "The Art of the Advocate" entertains us much more, since the subject dealt with is one of absorbing interest to every lawyer who wishes to improve his art. It looks a compendium of all the attributes, necessarily to be acquired by the lawyer, in order to succeed in his profession or to distinguish himself at the Bar. The choice illustrations from the advocacy of eminent men like Erskine, Brougham and Choate, and a host of lesser legal luminaries, have only secured for them our keen appreciation, while at the same time evoking our agreeable surprise at the considerable capacity of the authors, to collect these cart-loads of interesting anecdotes from numerous sources. The elaborate treatment of the subject of jury, though it may not prove of immense use to any except an exclusive branch of practitioners, namely criminal

lawyers, since there is not such jury system in our country as in England, it provides the student of psychology a good deal of engaging matter. The book, on the whole, if it is not profound with new suggestions on the art of advocacy, has refreshened a subject, which is of the utmost importance to the lawyer in his daily endeavour to win his case. We do not hesitate to express, that if at all the reader is struck with anything in these volumes, it is the unending store of illustrations that almost every page contains.—K. C.

THE LAW OF BENAMI TRANSACTIONS, by Mr. A. Ghosh, B.A., B.L., 2nd edition. 1928. Published by Eastern Law House, Calcutta. Price Rs. 4.

This is the second edition of the law relating to Benami transactions in India from the pen of Mr. Ghosh with whom we are familiar as the author of various legal publications. The system of Benami is very common in India and many of its legal incidents were not clear till recently. The law relating to Benami transactions is not the subject of any enactment though the legislature has made some reference to it in various Acts. The law on the subject has, therefore, been developed by judicial decisions which have not always been uniform. The volume under notice brings the case-law up-to-date and we believe that it will be found useful by the legal profession in this country.

THE CIVIL COURT PRACTICE AND PROCEDURE, by Atul Chandra Ganguli, M.A., B.L., 4th edition. 1928. Published by Eastern Law House, Calcutta. Price Rs. 5.

This is a book which affords a practical guide to lawyers and students of law in all matters of detail relating to practice and procedure under the various enactments which are in daily use and also giving model pleadings and other forms necessary for a beginner. The variety of enactments whose important provisions have been considered may be briefly enumerated to indicate the usefulness of the book. The author has embodied in this edition nearly every amending Act of importance having a bearing on civil procedure. The principles and practice under the Provincial Small Cause Courts Act, Suits Valuation Act, Court Fees and the Stamp Acts of the various Provinces, the Indian Succession Act, the Land Acquisition Act, the Lunacy Act and the Limitation Act as amended up to 1927, with the important rulings under the same, have been given.

THE LAW APPLICABLE TO CHRISTIANS, by Paul Appasamy, M.A., LL.B., Judge, City Civil Court, Madras. Published by the Christian Literature Society for India. 1928.

This is a book dealing with the personal law applicable to Christians in India written in such lucid language as can be intelligible to a lay reader. It is published mainly with a view to satisfy the needs of missionaries who sometimes in remote parts of the country require guidance on the subject without the assistance of any lawyer at hand. Such a book necessarily requires not to be couched in the technical language of the lawyer while at the same time legal ideas have to be expressed with accuracy. This difficult task the author has successfully accomplished in the pages of this book. We wish to draw attention to the various topics considered by the author in this volume. It is divided into three books or parts, the first book which is introductory deals with the Sources of Indian Law, Law and its main divisions and Personal and Territorial Law. The next book, which is perhaps the most important portion, deals with Conversion and its effects, Marriage and its legal consequences, Divorce and other reliefs, Parentage and guardianship, Intestate succession, Wills, The administration of deceased persons' estates, Ecclesiastical personnel and property and other allied subjects. The third book deals with the Law of Status, Transfer of Property, Registration, Criminal law and Arbitration. From the wide range of subjects dealt with, it must be apparent that the object of the author is more to give a general idea of them rather than deal with them in all their fullness. Leading decisions have also been referred to wherever necessary. We have no doubt that the book will be helpful not only to lay readers but to lawyers trying to make an acquaintance with the law relating to Christians.

THE LAW OF SPECIFIC RELIEF IN BRITISH INDIA, by S.M. Lahiri, M.A., B.L., 2nd edition. 1928. Published by Eastern Law House, Calcutta. Price Rs. 6.

This is the second edition of Mr. Lahiri's commentaries on the Specific Relief Act, whose first edition was favourably received by lawyers in this country. The main reason for it is that the author gives not merly a collection of cases under appropriate headings but has considered the leading principles of equity bearing on the subject giving full references to the English and American treatises on the subject and the leading decisions of the English Courts where those principles have been

laid down and developed. The author not content with references to decisions has given his opinion on their soundness, where, according to him, they may be open to question. To point only to one instance of this, we would refer to page 112 of the book, where the author comments adversely upon the decision in *Chidambara Swamigal* v. *Ramakrishna Reddiar*[1] dealing with the question whether an agreement by the guardian of a Hindu minor to sell the latter's property for a necessary purpose can be specifically enforced against the minor. It would interest the author to know that since the decision was given it has been reversed on appeal in *Ramakrishna Reddiar* v. *Kasivasi Chidambara Swamigal*[2] thus justifying the criticism of the learned author. Reference may be made in this connection to *Nageswara Rao* v. *Kotamma*[3] where the view of the author has been upheld following the decision in *Ramakrishna Reddiar* v. *Chidambara Swamigal*.[2] Such criticisms are bound to be helpful and we welcome this publication.

THE CODE OF CIVIL PROCEDURE (ACT V OF 1908), by Mr. R. Satyamurthi Aiyar, M.A., M.L., Advocate, High Court, Madras and Member of the Madras Provincial Judicial Service. 1928. Published by V. S. N. Chari & Co., Nungumbakkam, Madras. Price Rs. 4.

No lawyer can get on in his daily life without a thoroughly up-to-date edition of the Civil Procedure Code. The editor of this publication has brought out the text of the Code in this volume with a copious index. The editor has also given us a comparative table of the sections of the Code of 1882 with the corresponding provisions of the present Code and a list of sections and the rules of the Code which have been amended by the legislature and by the various High Courts under their rule-making power. There are also several appendices giving the report of the Select Committee, Statements of Objects and Reasons, the relevant provisions of the Government of India Act, the Letters Patents of the various High Courts and other allied subjects. Thus we have an up-to-date edition of the Civil Procedure Code with all information on allied topics.

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1. (1924) 47 M.L.J. 683. 2. (1927) 54 M.L.J. 412.
3. (1928) M.W.N. 214.